

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2014AP1381

Cir. Ct. No. 2013PR1598

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE MATTER OF THE LIVING TRUST OF MARGARET SHEEDY
AND PATRICK SHEEDY:**

MOLLY SIMON,

APPELLANT,

V.

**KATHLEEN A. SHEEDY, MARY GOSS, MICHAEL SHEEDY, PATRICK
SHEEDY, JR. AND ANN E. SEIDEL,**

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
KAREN E. CHRISTENSON, Judge. *Affirmed in part and reversed in part.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. Patrick Sheedy passed away in 2012 and his wife Margaret predeceased him. Molly Simon, one of Patrick and Margaret’s six children, and her five siblings (collectively referred to as “Kathleen”) dispute the disposition of a lake cottage in their parents’ trust estate.¹ To resolve that dispute, we must determine which trust executed by Patrick and Margaret—a 1995 trust or a 2004 trust—governs. We must also determine whether equitable estoppel bars Molly from arguing that the 2004 trust revokes the 1995 trust. Finally, we determine whether Patrick’s amendments to the 2004 trust, executed after Margaret’s death, are valid.

¶2 Molly appeals a circuit court order granting summary judgment to Kathleen. Molly argues that the unamended 2004 trust, which gives her the lake cottage, governs. Kathleen argues that the 1995 trust and the amended 2004 trust, both of which give the lake cottage to all four daughters, govern.

¶3 For the reasons that follow, we conclude that the 2004 trust revokes the 1995 trust; therefore, the 2004 trust governs the disposition of the lake cottage. We also conclude that Molly is not barred by the doctrine of equitable estoppel from arguing that the 2004 trust revokes the 1995 trust. Finally, we conclude that the amendments to the 2004 trust are valid; therefore, the third amendment governs the distribution of the lake cottage. Accordingly, we affirm the circuit court in part and reverse in part.

¹ Several of the parties share the same last name, and therefore for ease of reading we refer to them by their first names.

BACKGROUND

¶4 Patrick and Margaret Sheedy had four daughters and two sons who are the primary beneficiaries under both trust documents. On November 25, 1995, Patrick and Margaret created a revocable living trust (the 1995 trust). They later deeded four properties, including the lake cottage, to be held by the 1995 trust. On June 1, 2004, Patrick and Margaret created the Patrick T. Sheedy and Margaret P. Sheedy Revocable Trust (the 2004 trust). Approximately five months after executing the 2004 trust, Margaret died. In the years following Margaret's death, Patrick executed several amendments to the 2004 trust. On January 13, 2012, Patrick died.

¶5 Kathleen filed a motion for summary judgment on the two topics at issue here, which are whether the 2004 trust revokes the 1995 trust, and whether the amendments that Patrick made to the 2004 trust are valid. The circuit court granted Kathleen's motion. The court ruled that the Sheedys did not intend to revoke the 1995 trust, that both the 1995 trust and the 2004 trust remain in effect, and that "[t]he 1995 Trust and 2004 Trust each respectively govern those assets remaining in them;" therefore, the 1995 Trust governs the disposition of the lake cottage. In terms of the amendments to the 2004 trust, the circuit court found that Patrick executed valid amendments as authorized by the terms of the 2004 trust.

¶6 Before we proceed with our discussion of the issues raised by the parties, we describe the pertinent provisions of the 1995 trust, the 2004 trust, and Patrick's amendments to the 2004 trust.

1. Pertinent Terms of the 1995 Trust

¶7 The 1995 trust names Patrick and Margaret as the settlors and initial trustees of the trust. The Sheedys initially funded the 1995 trust with a portion of their marital property and later deeded four properties, including the lake cottage, to be held by the trust. The 1995 trust provides that at the death of one of the spouses, the original 1995 trust separates into two distinct trusts referred to as the Survivor's Trust and the Family Trust. At the death of the second spouse, the entire trust estate flows to the Family Trust and is distributed to the Family Trust beneficiaries. Under the terms of the Family Trust, the entire trust estate is split "into equal shares so that there will be one share for each of [the Sheedys'] daughters who is then living, and one share for each of [the Sheedys'] daughters who is then deceased and is survived by then living issue"² Under a provision of the 1995 trust, when all of the assets of the original trust are distributed to either the Survivor's Trust or the Family Trust, the original trust automatically terminates.

¶8 The 1995 trust includes a section titled "Revocation and Amendment." This section provides that Patrick and Margaret jointly can revoke the instrument during their lifetimes by written instrument. If the Sheedys revoke the 1995 trust, all marital property held by the trust reverts back to Patrick and Margaret to be held equally by them as tenants in common. On revocation, all

² The Family Trust also dictates that a fifth equal share be created and distributed under terms of the trust to all six of the Sheedys' children. The parties do not indicate that this provision affects the analysis of the issues they raise.

individual property reverts back to the party who had contributed the individual property to the trust.³

2. Pertinent Terms of the 2004 Trust

¶9 Most pertinent to the parties' dispute, the 2004 trust distributes the lake cottage to Molly alone, through creation of the Sheedy Family Trust share that comes into being when the first spouse dies.

¶10 The 2004 trust creates two "shares" at the death of the first spouse, a Marital Share and the Sheedy Family Trust share. Under the terms of the 2004 trust, the Marital Share consists of all trust assets and the individual property of the deceased spouse unless the surviving spouse disclaims property to be held by the Sheedy Family Trust. The 2004 trust provides that at the death of the surviving spouse, all of the trust assets, including those in the Marital Share, flow into the Sheedy Family Trust.

¶11 Unlike the Family Trust created by the 1995 trust, the Sheedy Family Trust share created by the 2004 trust makes specific distributions to specific beneficiaries upon the death of the second spouse. Notably, as stated above, the 2004 trust provides that upon the death of the second spouse the lake cottage is distributed to Molly. In terms of the power to amend, the 2004 trust provides that the "Grantor" may amend the trust.

³ The real estate, including the lake cottage, that Patrick and Margaret placed into the 1995 trust, is marital property.

3. Amendments to the 2004 Trust

¶12 After Margaret's death, Patrick executed four amendments to the 2004 trust. The first amendment changes the trustee designation. The second amendment largely removes the specific distributions under the Sheedy Family Trust and creates an undivided equal share of the trust assets for each of the Sheedy children. In effect, Molly no longer receives the lake cottage outright under the second amendment to the 2004 trust.

¶13 Approximately one year later, Patrick executed a third amendment that again changed the distributions under the Sheedy Family Trust. Under this amendment, the four daughters receive equal shares of the trust assets that remain after certain specific distributions listed in the amendment are made. Notably, the lake cottage is not included as a specific distribution. Thus, in effect, Molly no longer receives the lake cottage outright under the second and third amendments to the 2004 trust, but shares it with her three sisters. Patrick later executed a fourth amendment concerning the treatment of distributions to beneficiaries who are indebted to him at the time of his death.

DISCUSSION

¶14 We are tasked with determining whether the 1995 trust or the 2004 trust governs the disposition of Patrick and Margaret's trust estate, including the lake cottage. Because we conclude that the 2004 trust revokes the 1995 trust, we must also decide whether the doctrine of equitable estoppel bars Molly from arguing that the 2004 trust revokes the 1995 trust, and whether Patrick's amendments to the 2004 trust are valid.

1. Standard of Review and Principles of Interpretation

¶15 “The construction of a testamentary document presents a question of law.” **Furmanski v. Furmanski**, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). We consider questions of law independently without giving deference to the circuit court’s decision. *Id.*

¶16 In addition, “[i]t is clear that the principles of construction which are applicable to wills and testamentary trusts are also applicable to *inter vivos* trusts.” **Hamilton v. Forster**, 57 Wis. 2d 134, 137-38, 203 N.W.2d 711 (1973). The goal of will construction, and therefore the goal of the construction of *inter vivos* trusts like the trusts at issue here, is to determine the intent of the individual(s) who created the document in question. See **Madison Gen. Hosp. Med. & Surgical Found., Inc. v. Volz**, 79 Wis. 2d 180, 186, 255 N.W.2d 483 (1977). Therefore, we look to the text of the document in question and only consult outside sources if the text of the document or documents in question is ambiguous. See *id.* at 187. In **Furmanski**, our supreme court explained,

This intent is determined from the language of the document itself, considered in light of the circumstances surrounding the testator or settlor at the time the document was executed. The language of the document is the best evidence of the testator’s or settlor’s intent. Thus, we first look to that document. If there is no ambiguity in the document, there is no need for us to look further as to what may have been the testator’s or settlor’s actual intent.

Furmanski, 196 Wis. 2d at 215 (citations omitted).

¶17 Additionally, “[w]hen the facts and reasonable inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established.” **Milas v. Labor Ass’n of Wis., Inc.**, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997). We review questions of law independently from the circuit court. *Id.*

¶18 We first consider whether the 1995 trust or the 2004 trust governs, which, in turn, determines the disposition of the lake cottage. We then address Kathleen’s argument that Molly is foreclosed from arguing that the 2004 trust revokes the 1995 trust under the doctrine of equitable estoppel. Finally, we consider whether Patrick’s amendments to the Sheedy Family Trust share in the 2004 trust, executed after Margaret’s death, are valid.

2. Which Trust Governs?

¶19 Molly argues that the 2004 trust governs because specific assets like the lake cottage cannot possibly be distributed under both trusts, no specific words are required to revoke the 1995 trust, and the most recent document, the 2004 trust, indicates her parents’ intent.

¶20 Kathleen argues that the 1995 trust remains in effect. She directs our attention to the 1995 trust and the deed that transferred the lake cottage to that trust to argue that her parents’ intent is clear from those documents. In Kathleen’s view, because the lake cottage title shows the 1995 trust as owner, the 1995 trust must control the disposition of that asset, regardless of Patrick and Margaret’s expressed intent in the 2004 trust document to dispose of that asset differently. We are not persuaded by Kathleen’s arguments and, for the reasons that follow, we conclude that the 2004 trust revokes the 1995 trust.

¶21 To determine whether the 1995 trust or the 2004 trust governs, we must examine the language in the trust documents. In other words, our analysis must start with the language of the trust documents at issue. *See Lonsdorf v. Citizens State Bank & Trust Co.*, 41 Wis. 2d 335, 346, 164 N.W.2d 238 (1969) (discussing how to approach the situation when an individual has “two validly executed testaments”).

¶22 Under applicable principles of will construction, there is no requirement that a trust expressly revoke a previously executed trust. *See Riege v. Miller*, 180 Wis. 32, 33, 192 N.W. 373 (1923). The Wisconsin Supreme Court has stated that if a will “is duly executed and shows a change from a former will of disposition of property and disposes of testator’s estate, it operates as a revocation of the former will though there is no revoking clause.” *Id.* The Wisconsin Supreme Court has similarly stated,

When a person has two validly executed testaments, the first one is not revoked by the second unless there is a clear statement to that effect or unless the provisions of the second testament are so clearly repugnant to the provisions of the first that they cannot stand together.... When minor inconsistencies do arise between two or more valid testaments, however, the provisions of the testament executed the latest in time control.

Lonsdorf, 41 Wis. 2d at 345 (citation omitted).

¶23 The parties agree that the 2004 trust contains no language that expressly revokes the 1995 trust. However, under the facts of this case, that is not dispositive. As indicated, Wisconsin case law does not require that a subsequent trust expressly revoke a prior trust when the terms of the two documents clearly conflict. *See id.* Because the 2004 trust does not expressly revoke the 1995 trust, we then must determine whether the provisions of the 2004 trust “are so clearly repugnant to the provisions of the first that they cannot stand together.” *Id.*

¶24 Our review of the two trusts reveals that they inconsistently dictate how to handle the same assets, including the lake cottage. Under the law stated above, these inconsistencies prevent the two trusts from standing together, thereby establishing Patrick and Margaret’s intent to revoke the 1995 trust. As indicated, under the 1995 Family Trust provisions, Patrick and Margaret’s four daughters

receive equal shares of the trust estate with an equal fifth share to be split among all six children. The 1995 trust makes no specific distributions. In contrast, the 2004 Sheedy Family Trust makes specific and detailed distributions. That is, specific named beneficiaries are given specific properties, sums of money, or both. Most pertinent here, under the 2004 Sheedy Family Trust, Molly receives the lake cottage. Thus, unlike the more generalized directions in the 1995 trust as to how to distribute the assets in the Family Trust after the surviving spouse dies, the 2004 trust is very specific as to how to dispose of the lake cottage and other identified assets.

¶25 It is abundantly clear that the inconsistencies between the two trusts as to the disposition of the lake cottage and other specifically named trust assets is so “repugnant” as to leave no room for doubt that the Sheedys intended to revoke the 1995 trust with the 2004 trust. In short, the inconsistencies between the two trusts, especially with respect to the disposition of the lake cottage and other specifically named Family Trust assets, cannot be reconciled. Thus, under *Riege*, the later 2004 trust controls.

¶26 We acknowledge that the deed to the cottage continued to identify the 1995 trust as the cottage owner after Margaret died. But Kathleen fails to explain why this fact means that Patrick and Margaret lacked the authority to direct the disposition of that asset under the terms of the 2004 trust. While the deed issue might reflect a lack of care in handling the details of what would happen upon the death of the first spouse, the 2004 trust leaves no ambiguity as to what Patrick and Margaret decided to do with the cottage. Although the deed might not have been updated, it is clear that the cottage did not remain a 1995 trust asset. As we have seen, the 1995 trust was revoked by the 2004 trust.

3. The Doctrine of Equitable Estoppel

¶27 On September 7, 2005, Patrick, acting as trustee, sold certain farm property to Molly and her husband. At the time of the sale, the deed for the farm property listed the 1995 trust as the owner. Molly and her husband purchased the farm property for \$78,000; the assessed value of the property at the time of the sale was \$179,700. Kathleen asserts that by purchasing the farm at a value far less than its appraised value, Molly thereby accepted a benefit from the 1995 trust, and therefore under the doctrine of equitable estoppel cannot later try to challenge the validity of the 1995 trust. We are unconvinced by Kathleen’s argument because she fails to identify and apply the elements of equitable estoppel and because the farm property was not held by the 1995 trust at the time Molly purchased it.

¶28 Equitable estoppel requires “(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment.” *Milas*, 214 Wis. 2d at 11-12. The party asserting equitable estoppel must prove each element by clear and convincing evidence. *Gabriel v. Gabriel*, 57 Wis. 2d 424, 428, 204 N.W.2d 494 (1973).

¶29 Here, Kathleen fails to set forth the elements of equitable estoppel and apply them to the facts of this case. Instead, she simply makes a general argument that Molly received a benefit from the 1995 trust when she purchased the farm property from the 1995 trust for less than its assessed price. Kathleen does not identify, for example, how Molly’s purchase of the farm induced reliance to Kathleen’s detriment.

¶30 Even if we ignore Kathleen’s failure to specifically address the elements of equitable estoppel, her argument still fails. Kathleen seemingly relies

on the fact that at the time of the sale to Molly, the farm property deed indicated that the owner was the 1995 trust. But there is a difference between this deed issue and whether the asset was held in and controlled by the 1995 trust. As with the cottage, while the deed might not have been updated, it is clear that this asset did not remain a 1995 trust asset after the creation of the 2004 trust. As we have explained, the 1995 trust was revoked by the 2004 trust.

¶31 And, as we have explained, upon revocation, the terms of the 1995 trust dictates that any assets held by the 1995 trust go back to the couple to be held as tenants in common in the case of marital property and back to either Patrick or Margaret to be held as individual property in the case of any individual property. In short, under the terms of the 1995 trust, the surviving spouse, here Patrick, owns the farm. Therefore, the farm was not held by the 1995 trust and more importantly, Molly did not rely on the ongoing validity of the 1995 trust to purchase the farm property.

4. Validity of the Amendments to the Sheedy Family Trust

¶32 As we noted, Patrick amended the 2004 trust four times after Margaret's death. Only the second, third, and fourth amendments are at issue on this appeal. If the amendments to the 2004 trust are invalid, Molly receives the lake cottage under the unamended terms of the Sheedy Family Trust. If the amendments are valid, then the third amendment first makes specific distributions and then distributes the remaining assets, including the lake cottage, in undivided equal shares to Patrick and Margaret's four daughters.

¶33 Molly argues that the amendments to the Sheedy Family Trust at issue are invalid because the Sheedy Family Trust is an "irrevocable" trust not subject to amendment after her mother's death. She asserts that her parents' intent

in creating the 2004 trust was to achieve maximum tax savings and that this purpose requires the conclusion that the Sheedy Family Trust may not be amended by the surviving spouse. In response, Kathleen argues that the language of the 2004 trust plainly grants the power of amendment to the surviving spouse.

¶34 To determine whether the amendments at issue are valid, we look to the language of the 2004 trust. Article X of the 2004 trust grants the power to revoke and amend. The question we must resolve is whether this provision grants the power to amend to Patrick and Margaret acting together during their joint lifetimes or to either Patrick or Margaret individually as the surviving spouse. In pertinent part, Article X provides:

A. Grantor may at any time revoke this instrument in whole or in part by a written instrument delivered to the Trustee....

B. Grantor may at any time amend any terms of this trust by written instrument delivered to the Trustee....

¶35 The word “grantor” is not defined by the 2004 trust nor is it used anywhere else in the trust document. Thus, to ascertain what Patrick and Margaret intended “grantor” to mean, we look to other provisions in the trust that may shed light on the topic. See *Furmanski*, 196 Wis. 2d at 215.

¶36 We find the introductory paragraph of the trust helpful, specifically the following provision: “We [Patrick and Margaret] are sometimes referred to in this instrument individually as a ‘Settler’ or a ‘Trustee’ and collectively as the ‘Settlers’ or as the ‘Trustees,’ depending on the context.” The pronouncement that the term “settler” in the singular form refers to Patrick or Margaret individually is of particular importance because the terms “settler” and “grantor” are interchangeable. See *State v. Barr*, 78 Wis. 2d 254, 255, 253 N.W.2d 901 (1977)

(referring to the creator of a trust as “grantor or settlor”); *Nielsen v. Marshall & Ilsley Bank*, 271 Wis. 323, 327, 73 N.W.2d 425 (1955) (same); JAY E. GRENIG, 18 WIS. PRAC., ELDER LAW § 5:41 (5th ed. 2014) (“A trust is an agreement or arrangement by which a person, usually known as the settlor (or grantor or maker)....”).

¶37 Molly gives us no reason to think that the term “grantor” in this section is not synonymous with the word “settler.” Molly asserts in conclusory terms that the word “grantor” “can only be understood to permit amendment by Margaret *and* Patrick jointly,” but Molly does not support her interpretation of “grantor” with any analysis.

¶38 Regardless of the trust’s language, Molly argues that Patrick and Margaret intended for the Sheedy Family Trust to be an irrevocable trust to obtain maximum tax savings, and that an irrevocable trust could not be amended after Margaret’s death. First, Molly asserts “[a]s a matter of law, the 2004 Trust is a bypass/credit-shelter trust, a common estate planning tool used to reduce or avoid exposure to estate taxes.”⁴ This is a bold statement that Molly fails to support. Her contention that the structure of the 2004 trust is typical of a “credit shelter” or “bypass trust,” without more is not convincing. What is missing are references to a treatise or other such writings regarding the typical structure of a “credit shelter” or a “bypass trust,” with a comparison of the provisions in the 2004 trust to writings on this topic. Molly simply hopes that we take her at her word that this

⁴ In a credit shelter or bypass trust, “a married settlor places the amount of assets necessary to qualify for the federal (or state) estate tax exemption, thus maximizing the exemption at the deceased settlor’s death.” JAY E. GRENIG & NATHAN A. FISHBACH, 1A WIS. PRAC., METHODS OF PRACTICE § 23:22 (5th ed. 2014).

trust is what she says it is, and that as a result Patrick and Margaret necessarily intended to make the trust irrevocable.

¶39 Second, Molly directs us to language in Article V of the trust, which states, in part, that “It is our intent to qualify the estate of the deceased spouse for the maximum marital deduction under federal and/or Wisconsin estate tax law, as the case may be.” She argues that this language indicates that Patrick and Margaret’s overriding purpose in creating the 2004 trust was to achieve maximum tax savings. The language that Molly points us to, however, appears in the portion of the trust explaining the creation of the Marital Share and not in sections describing the creation of the 2004 trust in general or the Sheedy Family Trust. Furthermore, the language she relies on plainly states that Patrick and Margaret intended for tax savings to occur at the death of the first spouse utilizing the “maximum marital deduction.” The language says nothing about an objective to maximize the estate tax exemption at the death of the surviving spouse through the creation of the Sheedy Family Trust.

¶40 Finally, Molly directs us to trust tax filings to further indicate that the Sheedy Family Trust is an irrevocable trust. In effect, Molly argues that we should defer to the opinion of the tax document preparers, rather than analyze the trust documents ourselves. However, the issue before us is not how others interpreted the trust document. Rather we must reach our own conclusion by reference to the language of the 2004 trust.

¶41 As explained above, after considering the plain language of the 2004 trust, we are convinced that the terms of the 2004 trust grant the surviving spouse the authority to amend the Sheedy Family Trust. Therefore, we conclude that the

amendments to the Sheedy Family Trust executed by Patrick after Margaret's death are valid.

CONCLUSION

¶42 For the reasons discussed, we conclude that the 2004 trust revoked the 1995 trust; therefore, the 2004 trust governs the disposition of the lake cottage. We also conclude that Molly is not barred under equitable estoppel principles to argue this point. We further conclude that under the plain language of the 2004 trust, the surviving spouse is authorized to amend the trust, including the Sheedy Family Trust; therefore, Patrick's amendments to the Sheedy Family Trust are valid, and under the latest of those amendments the lake cottage is distributed in equal shares to the four Sheedy daughters. Accordingly, we affirm in part and reverse in part the court's order for summary judgment.

By the Court.—Order affirmed in part and reversed in part.

Not recommended for publication in the official reports.

